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In The

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FORMER UNITED STATES DIPLOMATS DIEGO C. ASENCIO, J. BRIAN ATWOOD, HARRY G. BARNES, JR., A. PETER BURLEIGH, WILLIAM C. HARROP, SAMUEL F. HART, JOHN L. HIRSCH, ALLEN HOLMES, GENTA HAWKINS HOLMES, ROBERT V. KEELEY, L. BRUCE LAINGEN, ANTHONY LAKE, SAMUEL W. LEWIS, STEPHEN LOW, ARTHUR MUDGE, DAVID D. NEWSOM, THOMAS R. PICKERING, LAURENCE E. POPE, ANTHONY QUAINTON, WILLIAM D. ROGERS, J. STAPLETON ROY, PAUL K. STAHNKE, MICHAEL STERNER, RICHARD N. VIETS AND ALEXANDER F. WATSON AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* has been in the diplomatic service of the United States government, for the most part as a presidential appointee. Most of us also submitted a brief *amici curiae* before this Court in the *Rasul* and *Al Odah* cases in 2004. At that time we argued that denial of *habeas corpus* to prisoners at Guantanamo undermined one of our country's most important diplomatic assets – our perceived commitment to the rule of law. We now reiterate and stress that message in light of developments since 2004. Our names and diplomatic posts are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

J. Brian Atwood served as Under Secretary of State for Management in 1993 and as Administrator of the United States Agency for International Development from 1993 to 1999.

Harry G. Barnes, Jr. served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977

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[1] The parties in the petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no person or entity other than the *amici curiae*, their counsel of record, or the Center for Civil and Human Rights of Notre Dame Law School, has made a monetary contribution to the preparation or submission of this brief.

to 1981, Ambassador to India from 1981 to 1985 and Ambassador to Chile from 1985 to 1988.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

William C. Harrop served as Ambassador to Guinea from 1975 to 1977, Deputy Assistant Secretary of State for Africa from 1977 to 1980, Ambassador to Kenya from 1980 to 1983, Inspector General of the Department of State and the Foreign Service from 1983 to 1987, Ambassador to Zaire from 1987 to 1991, and Ambassador to Israel from 1991 to 1993.

Samuel F. Hart served as Ambassador to Ecuador from 1982 to 1985.

John L. Hirsch served as Ambassador to Sierra Leone from 1995 to 1998.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Genta Hawkins Holmes served as Ambassador to Namibia from 1990 to 1992, Director General of the Foreign Service and Director of Personnel for the Department of State from 1992 to 1995, and Ambassador to Australia from 1997 to 2000.

Robert V. Keeley served as Ambassador to Mauritius from 1976 to 1978, Deputy Assistant

Secretary of State for African Affairs from 1978 to 1980, Ambassador to Zimbabwe from 1980 to 1984, and Ambassador to Greece from 1985 to 1989.

L. Bruce Laingen served as Ambassador to Malta from 1977 to 1979 and Charges D'Affaires in Tehran from 1979 to 1981.

Anthony Lake is a Professor at Georgetown University's School of Foreign Service, and served as Assistant to the President for National Security Affairs from 1993 to 1997.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

Stephen Low served as Ambassador to Zambia from 1976 to 1979 and as Ambassador to Nigeria from 1979 to 1981.

Arthur Mudge served as USAID Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

David D. Newsom served as Ambassador to Libya from 1965 to 1969, Assistant Secretary of State for African Affairs from 1969 to 1974, Ambassador to Indonesia from 1974 to 1977, Ambassador to the Philippines from 1977 to 1978, and Under Secretary of State for Political Affairs from 1978 to 1981.

Thomas R. Pickering served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, Ambassador to the Russian Federation from 1993 to 1996, and Under Secretary of State for Political Affairs from 1997 to 2001.

Laurence E. Pope served as Associate Coordinator for Counter-terrorism from 1991 to 1993, Ambassador to Chad from 1993 to 1996, and Political Advisor to the Commander in Chief, US Central Command, from 1997 to 2000.

Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, Ambassador to Peru from 1989 to 1992, and Assistant Secretary of State for Diplomatic Security from 1992 to 1995.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs, U.S. Coordinator, Alliance for Progress, from 1974 to 1976, and Under Secretary of State for Economic Affairs from 1976 to 1977.

J. Stapleton Roy served as Ambassador to Singapore from 1984 to 1986, Ambassador to the People's Republic of China from 1991 to 1995, Ambassador to Indonesia from 1996 to 1999, and Assistant Secretary of State for Intelligence and Research from 1999 to 2000.

Paul K. Stahnke is Minister Counselor, retired. Among other posts, he was Counselor of Mission at the United States Mission to the Organization for Economic Cooperation and Development in Paris from 1978 to 1982, and Permanent Representative to the United Nations ESCAP (Economic and Social Council for Asia and the Pacific) from 1982 to 1988, while also serving as Economic Counselor in the United States Embassy in Bangkok during the same period.

Michael Sterner served as Ambassador to the United Arab Emirates from 1974 to 1976, and Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs from 1977 to 1981.

Richard N. Viets served as Ambassador to Jordan from 1981 to 1984.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

Each of us is persuaded that these cases present issues of profound importance to the future role and influence of the United States in the world. Accordingly, *amici curiae* submit this brief in support of the petitioners, Lakhdar Boumediene et al. and Fawzi Khalid Abdullah Fahad Al Odah et al.

SUMMARY OF ARGUMENT

The court of appeals held that federal courts lack jurisdiction over petitions for *habeas corpus* by prisoners at Guantanamo. The effect of this ruling may be to deny prisoners at Guantanamo meaningful judicial review of the lawfulness of their incarceration.

In the *Rasul* and *Al Odah* cases in 2004, following lower court rulings which denied prisoners at Guantanamo access to meaningful judicial review, most of the present *amici* joined a brief *amici curiae* of former diplomats who advised this Court of the adverse diplomatic consequences for the United States of those rulings.

Not only were the lower court rulings widely criticized abroad, but they were seized upon by repressive governments as a license to incarcerate their own citizens and others with impunity. The result, we advised this Court, undermined "what has long been one of our proudest diplomatic advantages – the nation's Constitutional guaranty, enforced by an independent judiciary, against arbitrary government."[2]

In the three years since this Court's judgments in *Rasul* and *Al Odah* affirming the right of prisoners at Guantanamo to *habeas corpus*, large numbers of *habeas* petitions have been filed on behalf of prisoners at Guantanamo. However, Congress has subsequently eliminated *habeas corpus* for prisoners at Guantanamo, creating instead an alternative judicial review remedy, whose

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[2] *Brief of Diego C. Asencio et al. as Amici Curiae in Support of Petitioners*, at 5, in *Rasul v. Bush* and *Al Odah v. US*, Nos. 03-334, 03-343 (2004).

alleged inadequacy is among the issues presently before this Court.

Meanwhile the worldwide criticism of our indefinite incarcerations at Guantanamo – which now exceed five years for some prisoners – not only continues, but grows stronger. Despairing of a judicial solution, respected international organizations and friendly governments now call simply for the closing of Guantanamo.

The President indicates that he, too, would in principle prefer to close the detention facility. However, practical obstacles reportedly impede closing the prison, and may continue to do so for years.

If the mounting cost to American diplomatic interests is finally to be curbed, it is imperative, at minimum, to restore meaningful judicial review for prisoners at Guantanamo. Our nation cannot credibly champion the rule of law in the world, while being seen to disregard it in our own affairs.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers, others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government dealing with "that vast external realm." All are retired from public service.

It is not our purpose to add to what the parties will offer on the merits. We hope rather to enlarge on their presentation by setting before the Court our collective

professional experience as to the significance for American diplomacy and international relations of the holdings of the court below.

We understand that the D.C. Circuit Court of Appeals held that in light of recent statutory amendments, prisoners at Guantanamo no longer have the right to *habeas corpus* recognized by this Court in *Rasul v. Bush* in 2004,[3] and are limited to an alternative judicial remedy, whose adequacy is among the issues now presented before this Court.[4]

This is, from our foreign policy experience, a case of vast public import. In the *Rasul* and *Al Odah* cases in 2004, following lower court rulings which likewise denied prisoners at Guantanamo access to meaningful judicial review, most of us joined a brief *amici curiae* of former diplomats, alerting this Court to the adverse diplomatic consequences of those rulings.

Not only were the lower court rulings widely criticized abroad, but they were seized upon by repressive governments as pretexts to imprison their own citizens and others with impunity. The result, we advised this Court, undermined one of our most important diplomatic assets – our nation's traditional constitutional safeguards, enforced by independent courts, against arbitrary government.[5]

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[3] 542 U.S. 466 (2004).

[4] *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

[5] *Brief of Diego C. Asencio et al. as Amici Curiae in Support of Petitioners*, at 5, in *Rasul v. Bush* and *Al Odah v. US*, Nos. 03-334, 03-343 (2004).

In the three years since this Court's judgments in *Rasul* and *Al Odah* affirming the right of prisoners at Guantanamo to *habeas corpus*, large numbers of *habeas* petitions have been filed. However, in the Detainee Treatment Act of 2005, Congress eliminated *habeas corpus* prospectively for prisoners at Guantanamo, creating instead an alternative judicial remedy.[6] In the Military Commissions Act of 2006, Congress apparently extended that denial of *habeas corpus* retroactively to petitions already filed in the courts.[7]

We understand that the questions of whether, despite these statutes, prisoners at Guantanamo are constitutionally entitled to *habeas corpus* and, if so, whether the alternative statutory review is a "constitutionally adequate substitute for habeas corpus," are among the issues now before this Court.[8] We profess no special expertise on those constitutional questions.

However, our professional experience convinces us that American diplomatic credibility and effectiveness in many areas of international relations suffer greatly from the widely shared perception that, by denying prisoners at Guantanamo access to *habeas corpus*, our country has lost

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[6] Detainee Treatment Act of 2005, Title X, Public Law No. 109-148, 119 Stat. 2739. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court held that the Act did not bar *habeas* jurisdiction over petitions pending at the time of its enactment.

[7] Military Commissions Act of 2006, section 7(b), Pub. Law No. 109-366, 120 Stat. 2600.

[8] *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (Breyer, J., dissenting from denial of *certiorari*), *vacated, cert. and rehearing granted*, 127 S. Ct. 3078 (2007).

sight of its historic commitment to independent and effective judicial review of the lawfulness of detention.

As we said in our brief *amici curiae* in *Rasul*, that perception was already widespread by 2004, as evidenced by diplomatic and other denunciations of our denying prisoners at Guantanamo access to effective judicial review.[9]

In the three years since *Rasul*, the length of imprisonment at Guantanamo without effective judicial review, which exceeded two years for some prisoners in 2004, now exceeds five years in some cases. Yet to our knowledge, not a single prisoner at Guantanamo has been able to litigate to conclusion a *habeas* petition challenging the lawfulness of his detention. The court of appeals has now ruled that none may do so.

The world has grown understandably impatient with these deepening departures from the basic tenet of Anglo-American law, that no one may be subjected to prolonged deprivation of liberty without meaningful judicial review. Ever since the coming into force in 1976 of the International Covenant on Civil and Political Rights, now joined by more than 150 nations including the United States, that basic principle of our legal tradition is also a fundamental right in international law.[10]

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[9] *Brief of Diego Asencio et al.*, note 2 above, at 8-9.

[10] International Covenant on Civil and Political Rights, UN G.A. Res. 2200A (XXI), 16 December 1966, *entered into force*, 23 March 1976, 999 UNTS 171, article 9.4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.")

Thus, in 2005, denouncing detentions at Guantanamo as inconsistent with "the rule of law," the Parliamentary Assembly of the Council of Europe became only the latest international body to call on the United States "to allow all detainees to challenge the lawfulness of their detention before a regularly constituted court . . . "[11]

During 2004 and 2005, respected judges of friendly nations continued to denounce our detentions at Guantanamo. Joining a House of Lords ruling against indefinite detentions of suspected foreign terrorists pending deportation, Baroness Hale was nonetheless at pains to note that the prison in question was "not the British Guantanamo Bay."[12] In another judicial opinion, the current President of the Inter-American Court of Human Rights lamented the "*Guantanamización*" of criminal procedure in the hemisphere.[13]

By 2006, however, as a critical mass of observers became persuaded that no judicial solution would emerge, worldwide condemnation of Guantanamo escalated to the point of calling for outright closure of the prison. That call was made public in early 2006 in a joint report by five independent experts of the United Nations Commission on

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[11] Council of Europe, Parliamentary Assembly, Resolution 1433, *Lawfulness of detentions by the United States in Guantánamo Bay*, 26 April 2005, pars. 7 and 8.iii, accessible at http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm (last visited Aug. 15, 2007)

[12] *A v. Sec'y of State*, [2004] UKHL 56 [2005], Baroness Hale of Richmond, ¶223.

[13] Inter-Am. Ct. H. Rts, *Tibi v. Ecuador*, Judgment of 7 Sept. 2004, Concurring Op. Judge Sergio García Ramirez, ¶30, *www.oas.org* (last visited Aug. 12, 2007).

Human Rights.[14] It was soon echoed by the Secretary General of the Council of Europe,[15] the President of the Parliamentary Assembly of the Council of Europe,[16] the European Parliament of the European Union,[17] the United Nations Committee Against Torture,[18] the Inter-American Commission on Human Rights,[19] the Prime Ministers of Denmark and Germany,[20] and the Attorney General of Britain.[21]

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[14] United Nations Commission on Human Rights, *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention et al., Situation of detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120, 27 Feb. 2006, ¶96, accessible at http://daccessdds.un.org/doc/UNDOC/GEN/G06/112/76/PDF (last visited Aug. 15, 2007).

[15] Council of Europe Press release – 009 (2007), *US detention facility in Guantanamo was set up 5 years ago – Council of Europe Secretary General calls for its immediate closure*, 9 January 2007, accessible at https://wcd.coe.int (last visited Aug. 15, 2007).

[16] Council of Europe Press release – 089 (2006), *PACE President joins call for closure of Guantanamo*, 17 Feb. 2006, accessible at https://wcd.coe.int (last visited Aug. 15, 2007).

[17] *Bulletin of the European Union*, EU 6-2006, par. 1.33.2, *European Parliament resolution on the situation of prisoners at Guantanamo*, 13 June 2006, accessible at http://europa.eu/bulletin/en/200606/p133021.htm (last viewed Aug. 15, 2007).

[18] UN Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, ¶22, accessible at http://daccessdds.un.org/doc/UNDOC/GEN/G06/432/25/PDF (last visited Aug. 15, 2007).

[19] Inter-American Commission on Human Rights, Press Release No. 27/06, *Inter-American Commission Urges to Close Guantanamo Without Delay*, July 28, 2006, accessible at http://www.cidh.oas.org/Comunicados/English/2006/27.06eng.htm (last visited Aug. 15, 2007).

[20] Associated Press, *Rights Activists Say US Needs to Act; Want Prisoners Tried or Released*, BOSTON GLOBE, June 11, 2006, p. A11.

[21] K. Sullivan, *British Attorney General Says Guantanamo 'Should Close,'* THE WASHINGTON POST, May 11, 2006, p. A21.

The Lord Chancellor of Britain exemplified the chorus of respected international figures condemning Guantanamo as an "affront to the principles of democracy." Avowedly speaking with the authority of his government, the Lord Chancellor publicly accused the US of "deliberately seeking to put detainees beyond the rule of law in Guantanamo Bay."[22]

In response, President Bush let it be known that he would also prefer to close the prison at Guantanamo.[23] However, practical obstacles have impeded closing the facility to date and may continue to do so for years to come.[24]

Meanwhile it is essential to halt the hemorrhaging of American diplomatic credibility through the open wound of Guantanamo. As long as the prison continues to operate, at minimum, prisoners must have access to meaningful, independent judicial review.

The world understands that this country must decide how our criminal justice system should address the contemporary realities of terrorism. That is a domestic matter.

The Guantanamo prisoners case is different. It has become an issue of unusual concern abroad because it is a vivid reminder of how America's undoubted military power

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[22] *World in Brief*, THE WASHINGTON POST, Sept. 14, 2006, p. A15.

[23] White House news release, *President Bush and Prime Minister Rasmussen of Denmark Participate in Joint Press Availability*, June 9, 2006, accessible at http://www.whitehouse.gov/news/releases/2006/06/20060609-2.html (last visited Aug. 15, 2007).

[24] *E.g.*, W. Glaberson, *Hurdles Frustrate Effort to Shrink Guantánamo*, N.Y. TIMES, August 9, 2007, p. A1.

may be applied elsewhere. Citizens of foreign countries cannot assume that what happened to the Guantanamo prisoners cannot happen to them. Neither citizenship in a friendly country, nor location far from hostilities, renders them safe from capture and transfer to Guantanamo. On the contrary, as noted by Justice Breyer:

> [P]etitioners in *Boumediene* are natives of Algeria, and citizens of Bosnia, seized in Bosnia. . . . Other detainees, including several petitioners in *Al Odah*, also are citizens of friendly nations, including Australia, Canada, Kuwait, Turkey, and the United Kingdom; and many were seized outside any theater of hostility, in places like Pakistan, Thailand and Zambia.[25]

It is not evident why, if the Executive Branch can detain prisoners in Guantanamo free of effective judicial inquiry, it cannot expand the practice to establish a global criminal justice system with other prison camps like Guantanamo, similarly subject to no legal oversight and in which any foreigner deemed a danger by some official might be detained indefinitely. Indeed, our government acknowledged last year that it used secret prisons abroad. Even while transferring the then remaining 14 prisoners from those prisons to Guantanamo, the government made no commitment not to use secret prisons again in the future; subsequently, it has reportedly detained at least one new prisoner in a secret prison.[26]

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[25] *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (Breyer, J., dissenting from denial of *certiorari*), *vacated, cert. and rehearing granted*, 127 S. Ct. 3078 (2007).

[26] S. Stolberg, *President Moves 14 Held in Secret to Guantanamo*, NEW YORK TIMES, Sept. 7, 2006, p. A1; G. Miller, *Bush signs rules for CIA interrogators*, LOS ANGELES TIMES, July 21, 2007, p. A1.

The Detainee Treatment Act and Military Commissions Act deny *habeas corpus* only to prisoners who are not United States citizens. This limitation comforts domestic public opinion. Abroad, however, it only adds fuel to the fire. We are seen to tell the world, in effect, that we are unwilling to subject Americans to the same treatment we impose on foreign citizens. Aside from whether such discrimination on the basis of nationality is unlawful, it is offensive to others.[27]

The location of these discriminatory detentions at the American military base in Cuba has a further resonance abroad. As this Court well knows, Guantanamo is an artifact of America's imperial age in this hemisphere. There is, in the view of others, a heavy irony that these prisoners should be claimed to be beyond the reach of effective judicial review simply because they are being held in an enclave in Cuba – a nation whose authoritarian pretensions this country has opposed for over forty years.

It has been the experience of each of us that our most important diplomatic asset has been this nation's values. Power counts. But this nation's respect for the rule of law – and in particular our reverence for the fundamental constitutional guarantee of individual freedom from arbitrary government authority – have gone far to earn us the respect and trust which lie at the heart of all cordial relations between nations. Thus the perception of this case abroad – that the power of the United States can be

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[27] In *A v. Sec'y of State*, [2004] UKHL 56, the Law Lords ruled that Britain's indefinite detention of suspected foreign terrorists pending deportation was unlawfully discriminatory and disproportionate, when there was no similar detention of suspected British terrorists, despite their presenting similar risks.

exercised outside the law and even, it is presumed, in conflict with the law – has severely diminished our stature and repute in the wider world, and will continue to do so for as long as prisoners at Guantanamo are denied meaningful judicial review.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Indeed, the matter has rarely been better put than by President Bush in signing the Torture Victims Protection Act on March 12, 1992:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that they are respected everywhere.[28]

The teaching of the court below, however, is that those "democratic institutions and the rule of law" need not be respected in Guantanamo or indeed anywhere other than in the United States. This puts United States citizens abroad – and the capacity of American diplomats to protect their interests – at risk because it can be invoked in support of other countries' practices of arbitrary detention.

This teaching not only offends our friends, it also provides ammunition to enemies of freedom. Repressive states use our example to justify their own abuses. Explaining the detention of militants without trial,

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[28] Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (March 12, 1992).

Malaysia's law minister said that the practice was "just like the process in Guantanamo Bay."[29]

In recent testimony before the US Helsinki Commission, a respected human rights organization reported similar invocations of Guantanamo by officials in Egypt, Jordan, Lebanon, Pakistan, Russia, Saudi Arabia and Venezuela. When Secretary of State Rice criticized human rights violations in Venezuela, for example, that nation's Foreign Minister retorted, "How many prisoners do they have in Guantanamo?"[30]

The present Administration summed up two centuries of foreign policy in the *National Security Strategy of the United States of America*, issued most recently in 2006. That document commits the United States to champion "the nonnegotiable demands of human dignity." It points out that the United States "has long championed freedom because doing so reflects our values and advances our interests." It adds that the United States "must defend liberty and justice because these principles are right and true for all people everywhere." And it defines the "nonnegotiable demands of human dignity" as including "the rule of law," "human rights," and limits on the "reach of government."[31]

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[29] Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003.

[30] Human Rights Watch, *Guantanamo: Implications for U.S. Human Rights Leadership*, testimony before the US Helsinki Commission by Tom Malinowski, June 21, 2007, accessible at http://hrw.org/english/docs/2007/06/21/usint16489.htm (last visited Aug. 15, 2007).

[31] *National Security Strategy of the United States of America* (March 2006), chapter II, *available at* http://www.whitehouse.gov/nsc/nss/2006.html (last visited Aug. 15, 2007).

In our professional experience we have found these principles to be the strongest assets of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law. In this, we have led the world. The success of our interests in the wider arena turns importantly on the extent to which this nation is perceived as continuing to abide by these principles. Any hint that America is not all that it claims, or that it is prepared to ignore a "nonnegotiable demand of human dignity," that it can accept that the Executive Branch may imprison whom it will and do so beyond the reach of the due process of law, demeans and weakens this nation's voice abroad.

We have taken it as our duty to so state to this Court. There is no doubting America's power at this juncture. But values count too. And, for this nation, there is no benefit in the exercise of our undoubted power unless it is deployed in the service of fundamental values: democracy, the rule of law, human rights, and due process. To the extent that we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced. Such at least is our collective experience.

George Kennan's Long Telegram from the American Embassy in Moscow to the State Department in 1946 defined the authoritarian bestiality of the Soviet system and its aim to break "the international authority of our state."[32] It was perhaps the most important American

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[32] George Kennan, *"The Long Telegram" from Moscow, Feb. 22, 1946, in* FOREIGN RELATIONS OF THE UNITED STATES 706 VOL. VI (Government Printing Office, 1969).

diplomatic communication of the last century. In closing, Kennan spoke for us all and for all time:

> [T]he greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.[33]

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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[33] *Id.* at 709.